United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

75-1435

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B
P/S

Docket No. 75 - 1435

UNITED STATES OF AMERICA,

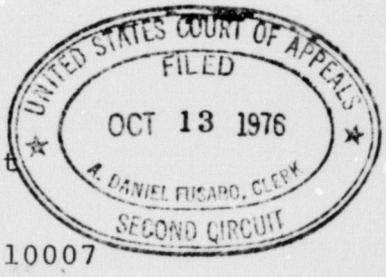
Appellee,

-vs.-

LAM LEK CHONG, a/k/a Jimmy Lam,
YUK CHOI CHUNG, a/k/a David Chan
and FRANCISCO LIGANOZA,

Appellants.

PETITION FOR REHEARING WITH
SUGGESTION FOR REHEARING EN BANC
IN BEHALF OF APPELLANT LAM LEK CHONG



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Lam Lek Chong, also known as Jimmy Lam, petitions the Court for rehearing (F.R.A.P., Rule 40), and suggests rehearing en banc (F.R.A.P., Rule 35), upon the ground that the Court has overlooked or misapprehended, and has consequently improperly decided, points of law or fact which were raised on appeal.

The order of affirmance was entered herein on September 27, 1976, under the title United States v. Lam Lek Chong, et al. (Slip Sheet Ops., September Term, 1975, at p. 5725).

The appellant [hereinafter, "Lam"], also joins in the petition for rehearing with a suggestion for rehearing en banc which has been filed herein by the co-appellant Yuk Choi Chung.

Questions Presented for Rehearing and Rehearing en banc

1. The government's proof at trial focused upon three narcotics transactions. The first of these occurred on January 30, 1974. This Court's opinion ["Op."] appears to agree with the defense contention that the first of these transactions (January 30, 1974) was not shown by the government's proof to have been part of the same conspiracy charged in the indictment. (Op., at 5736-8). The opinion goes on, however, to hold that the government's proof of that transaction, over persistent defense objection, "did not prejudice the appellants." (Op. at 5738). The opinion then excuses the trial court's failure to give the jury a multiple conspiracy charge, upon the ground that the defendants' requested charge was not "accurate in every respect" (Op., at 5741-2). This combination of holdings by this Court overlooks the following facts: (a) the trial

court refused to give a multiple conspiracy charge, not because it disagreed with the text of the charge, but rather because it found that there was no evidence of multiple conspiracies in the case - a conclusion now shown to be erroneous by this Court's opinion; (b) other parts of the trial court's charge specifically permitted the jury to convict based upon the January 30 transaction - a transaction which this Court has agreed was not shown by the proof to be part of the overall conspiracy.

2. This Court's holding with respect to the receipt of evidence concerning the Marquis reagent test, in the absence of any authentication and in the absence of any fair opportunity for the defense to meet that evidence, constituted a clear departure from Constitutional and evidentiary standards.

Reasons for Granting Rehearing

POINT I

IN VIEW OF THE TRIAL COURT'S REFUSAL TO CHARGE THE JURY AS TO MULTIPLE CONSPIRACIES, THE PROOF OF THE JANUARY 30 TRANSACTION WAS NOT HARMLESS ERROR.

This Court's opinion holds that, although the January 30 transaction was not shown to be part of the same conspiracy as the remaining transactions, the proof of the January 30 transaction was "harmless" since:

(1) "The number of conspiracies and conspirators were [not] too great for the jury's intelligent differentiation." (Op., at 5739), and such proof would have been admissible as to Lam for the purpose of showing "later guilty knowledge and intent" (Op., at 5740), and, "It [is] implausible that the jury convicted them on the basis of a 'spillover' of the activities of the earlier [January 30] conspiracy." (Op. at 5741)[Bracketed material added].

The difficulty with these asserted reasons for lack of prejudice is that the Court refused to give a multiple conspiracy charge to the jury and the charge that was given permitted the jury to convict based solely upon the January 30 transaction. (See: the Court's charge at Tr. 1762-3, quoted in our main brief at pp. 21-22).

This Court's opinion makes clear that a proper conviction of Lam could only rest upon the Hong Kong and March 30, 1974 transaction. It is certainly within the realm of possibility that the jury, for reasons advanced by the defense at trial, did not conclude that the defendants had criminally engaged in these later two transactions. Significantly, the only substantive count in the indictment charged only the defendant Li with respect to the May 30 transaction. However, the jury was unable to agree upon a verdict as to that substantive count, despite the fact that the transaction allegedly occurred in Li's apartment.

We turn, then, to the basis upon which this Court found that the court did not err in refusing to charge the jury as to multiple conspiracies. This Court held that the trial court properly refused the multiple conspiracy charge requested by the defense since it was not "accurate in every respect" (Op., at 5741).

This Court's holding does not accurately reflect, nor is it supported by, the actual events at trial. When the trial court declined to charge on multiple conspiracies, it did so, "because I don't think there is any evidence on multiple conspiracies." (Tr. 1606). Thus, the trial court effectively cut off discussion of the subject by holding that no basis existed for <u>any</u> charge on the issue. It simply is not fair to rationalize the court's failure to charge on multiple conspiracies based upon some defect in the charge that was requested of the trial court. The trial court's factual finding (now shown by this Court's opinion to have been erroneous) would have made any requested charge on the issue of multiple conspiracies futile. Faced with that finding, there was no conceivable reason why trial counsel had any reason to pursue the question of the content of a multiple conspiracy charge.

POINT II

THE TRIAL COURT IMPROPERLY RECEIVED IN EVIDENCE THE TESTIMONY OF AN AGENT WHO CLAIMED THAT HE RECEIVED A SAMPLE OF HEROIN IN HONG KONG AND THAT HIS TEST OF THAT SAMPLE SHOWED IT TO BE HEROIN. THE SAMPLE WAS NOT PRODUCED IN COURT OR OTHERWISE MADE AVAILABLE TO THE DEFENSE, AND THE AGENT WAS UNQUALIFIED TO TESTIFY AS TO THE RELIABILITY OF THE TEST OR THE INTEGRITY OF THE PROCEDURE HE FOLLOWED.

This Court's opinion disposed of this issue as follows:

> "***The questions concerning the possible unreliability of the Marquis reagent test, which showed that the cigarette package delivered in Hong Kong contained heroin, were for the jury's consideration in determing the weight to give to this evidence;[14] they did not bar the introduction of the results of the test. See: United States v. Bermudez, 526 F. 2d 89, 97-98 (2d Cir., 1975); United States v. Kelly, 420 F. 2d 26, 28 (2d Cir., 1969).***"

> "14 Defense counsel engaged in vigorous cross-examination on this point, so the question of the reliability of the test was well aired for the jury."

According to the testimony of Agent Wright, he received a small quantity of a brown rock substance from Lam in Hong Kong. Over objection, Wright was permitted to testify:

> "I had a chemical -- which is a Marquis reagent, that when it is mixed with a substance or with heroin will turn purple when heroin is present." (Tr. 670).

Counsel for Lam objected upon the ground that the substance in question had not been made available to the defense and upon the further ground that the agent was not qualified to testify with respect to the nature of the substance (Tr. 670-1). The prosecutor responded that the alleged sample was in Hong Kong and not available for the defense to examine (Tr. 672). Over the objections of the defense, the Court permitted Agent Wright to explain what he understood the Marquis reagent test to be and that when, as here, it produces a purple color then "it indicates that heroin is present in the substance." (Tr. 675).

On cross-examination, Wright admitted that no other tests were performed to ascertain the identity of the substance, that he had no knowledge of the chemical nature of the test, that he is not a chemist, that the matter was really "above my head", and that he had no knowledge with respect to what other substances might turn the same color when subjected to the test (Tr. 854-858).

This Court's opinion, as quoted supra, holds that since all of these indicia of unreliability were placed before the jury during cross-examination, it was for the jury to determine the weight to give to the evidence. We respectfully submit that the issue was not one of weight but rather one of admissibility.

Lam's defense to the Hong Kong transaction was that he had brought the agents to Hong Kong, due to the

pressure they were placing upon him in their undercover capacity, and that the whole Hong Kong venture was, at best, a farce either to pacify the agents or to defraud them of their money. The testimony at trial and the tape recordings received in evidence, certainly provided the jury with a basis to agree with these contentions of the defense. The only fact tending to mitigate against the defense contention was Agent Wright's claim that the Marquis reagent test revealed that the brown rock substance was heroin.

As the literature on the subject indicates, the Marquis reagent test is, in fact, quite unreliable. See: Bernheim, Defense of Narcotics Cases (Matthew Bender, 1975 Revision) § 402, and authorities there cited. In fact, the brown rock substance could have been any one of a number of innocent non-narcotic preparations. Agent Wright's testimony should have been no more admissible than if he had offered to testify that a Hong Kong police officer told him that the material looked like heroin. In short, by relying upon the hearsay imprimatur of some unspecified scientific opinion concerning the Marquis reagent test, Wright denied the defendant the opportunity to effectively confront and cross-examine the source of the evidence against him. That denial was compounded by the fact that the government had made no effort to obtain an independent qualified scientific analysis of the substance, and had not brought the substance from Hong Kong so that the defense might conduct

its own analysis of it.

In holding that the issue of unreliability was merely one affecting the weight of the evidence, and not its admissibility, this Court has ignored its prior holding in United States v. Kelly, 420 F. 2d 26, 28 (2d Cir., 1969), with respect to a cocaine test; to wit: "If the test was indeed unreliable at this stage, then it should not have been given to the jury." In Kelly, this Court reversed because the defense had not been given a fair opportunity to test the accuracy of the test in question. Precisely the same situation existed here. The defense could not probe the general reliability of the test; it could not probe the adequacy of the procedures followed by Wright; and it could not conduct an independent test of the alleged sample.

There is no way of knowing whether the jury's conviction of Lam was predicated upon the testimony with respect to the Marquis reagent test. If it was, the conviction rests upon an evidentiary base which, as a matter of due process of law and proper administration of justice, should be found thoroughly inadquate.

Conclusion

For all of the above reasons, the petition for rehearing or, alternatively, the suggestion for rehearing en banc should be granted.

Respectfully submitted,

HENRY J. BOITEL
Attorney for Appellant

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, : Docket No. 75-1435

-vs.- : AFFIRMATION OF SERVICE

LAM LEK CHONG, :

Appellant. :

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HENRY J. BOITEL, being an attorney duly admitted to practice law in the Courts of the State of New York, and a member of the Bar of this Court, affirms the following to be true under penalties of perjury, pursuant to Rule 2106 CPLR:

1. On October 12, 1976, I served two copies of the petition for rehearing with suggestion for rehearing en banc in behalf of appellant Lam Lek Chong upon the United States Attorney for the Southern District of New York, 1 St. Andrew's Plaza, New York, New York, to the attention of John Timbers, Esq., by depositing same in a post-paid, properly addressed wrapper in an official depository under the care and custody of the United States Postal Service within the State of New York.

Dated: New York, New York
October 12, 1976

Henry J. Boitel

HENRY J. BOITEL
Attorney for Appellant
Lam Lek Chong